

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 25, 2010 Session

STATE OF TENNESSEE v. DAVID L. BRUMMITT

Appeal from the Criminal Court for Sullivan County
No. S54,671 Robert H. Montgomery, Jr., Judge

No. E2009-01358-CCA-R3-CD - Filed October 14, 2010

The defendant, David L. Brummitt, was convicted by a Sullivan County Criminal Court jury of one count of especially aggravated robbery, a Class A felony, one count of reckless aggravated assault, a Class D felony, and one count of aggravated burglary, a Class C felony. The trial court imposed sentences of 24 years, four years, and six years, respectively. The sentences for reckless aggravated assault and aggravated burglary were ordered to be served concurrently to one another but consecutively to the sentence for especially aggravated robbery, for a total effective sentence of 30 years' incarceration. In this appeal as of right, the defendant challenges the sufficiency of the convicting evidence and also argues that the trial court erred in permitting the State to impeach him with prior misdemeanor convictions of theft. Because we conclude that there is insufficient evidence to support the especially aggravated robbery conviction, we reverse this count and remand for the entry of judgment and sentencing for the lesser included offense of aggravated robbery. The judgments for reckless aggravated assault and aggravated burglary are affirmed.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed in Part; Reversed in Part; Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which NORMA MCGEE OGLE and CAMILLE R. MCMULLEN, JJ., joined.

Gene Scott, Jr., Johnson City, Tennessee, for the appellant, David L. Brummitt.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; H. Greeley Welles, Jr., District Attorney General; Julie R. Canter and Adam Moore, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On July 19, 2008, a Sullivan County grand jury charged the defendant, by presentment, with one count of especially aggravated robbery, *see* T.C.A. § 39-13-402 (2006), one count of aggravated assault, *see id.* § 39-13-102, one count of attempted second degree murder, *see id.* § 39-13-210; *id.* 39-12-101, and one count of aggravated burglary, *see id.* § 39-14-403. The State subsequently amended the aggravated assault count to reckless aggravated assault.

On the evening of January 1, 2008, Michael May was alone at the home he shared with his partner, Gary Adams, at 509 Fairmont Avenue in Kingsport, Tennessee. He recalled that he was waiting for the six o'clock news to begin when the defendant arrived at his back door. Mr. Adams knew the defendant as someone from their neighborhood, but Mr. May had not met the defendant before December 31, 2007, when the defendant accompanied Mr. May and Mr. Adams to dinner. On the evening of January 1, Mr. May invited the defendant inside and locked the kitchen door behind them, as was his practice to do.

Mr. May and the defendant went to the den where Mr. May waited for the news to begin. He recalled that the defendant's cellular telephone rang continuously. The defendant told Mr. May that an ex-girlfriend was calling him and did not answer the phone. Mr. May told the defendant that he could go to the kitchen to talk to the caller if necessary. As the news began, the defendant went to the kitchen, and Mr. May heard the kitchen door open.

Mr. May began to rise from the couch to see why the kitchen door had been opened when "this boy came around the corner of the hallway" with an open pocket-knife in his hand. Mr. May testified that "before [he] knew it [the boy] was on top of [him] beating [him]." Mr. May, who only three weeks before had completed radiation and chemotherapy for throat cancer, struggled with the knife-armed assailant but was unable to get up from the floor. The man with the knife repeatedly told Mr. May that "we want your money and your drugs" as he held the knife to Mr. May's throat.

The man forced Mr. May to the kitchen where Mr. May discovered another man armed with a baseball bat. Mr. May recalled that this man "kept hitting [the bat] with his hand." Mr. May was particularly scared because there had been a murder recently in the neighborhood. He attempted to grab his car keys and cellular telephone from the kitchen counter in an effort to escape, but he was unable to reach them.

Both men forced Mr. May upstairs where the men looked through bedroom drawers and boxes searching for money and drugs. Mr. May recalled that the bat-armed man

seemed angry when he was unable to find any money. The knife-armed man “methodically” searched the medicine cabinet and linen cabinet for narcotics but discovered only one bottle of Lortab that had been prescribed to Mr. May during his cancer treatment. While upstairs, Mr. May saw the men take the pills, some jewelry, and a money bag containing about \$150 in spare change. The men cut a web camera cord in the computer area. After searching through all of the upstairs rooms, the knife-armed man led Mr. May to the stairs. Mr. May said that when he had reached halfway down the stairs, the knife-armed man either pushed or kicked him, forcing Mr. May to fall to the tiled foyer area at the bottom of the stairs. He recalled having difficulty seeing because of blood coming from his eye and face.

Once downstairs, the men cut a telephone cord in the sunroom and led Mr. May to the kitchen where they continued to search through the cabinets for money and drugs. Mr. May recalled that the men seemed to think they would find drugs and money in the home, but he and Mr. Adams never kept cash at home. While Mr. May was in the kitchen, Mr. Adams came through the door and asked, “‘Mike, where’s your Jeep?’” As he entered the doorway, the bat-armed man struck Mr. Adams on the side of the head, which made a “cracking sound” and knocked Mr. Adams unconscious to the floor. The bat-armed man rifled through Mr. Adams’ pockets.

When Mr. Adams regained consciousness, he lunged for the doorway and escaped to the backyard with the bat-armed man following close behind him. At this point, the knife-armed man started throwing things into a bag and fled from the kitchen towards the alley behind the house. Mr. May locked the door and immediately telephoned 9-1-1. While on the telephone, he realized that the shades in the den had been drawn, that his laptop and the defendant’s cellular telephone had been taken from the couch, and that his Jeep was missing from the driveway near the garage. Mr. May was certain that neither of the armed men took the laptop or cellular telephone with them when they fled to follow Mr. Adams. He also recalled that, after the armed men entered the home, he never saw the defendant again. He did not hear the defendant’s voice or hear either man refer to the defendant during the assault. The entire incident lasted about 25 minutes. Mr. May telephoned 9-1-1 at approximately 6:20 p.m.

Mr. May suffered bruising and lacerations to his face as a result of the beating and fall. His shoulders were also bruised. He testified that he was “very scared” throughout the incident. He was reluctant to seek treatment at the hospital because he was too frightened to leave the house. He recalled that the emergency personnel gave him something, possibly novocaine, to deaden the pain in his face.

As to the items taken from his home, Mr. May testified that many of them were sentimental. He recalled that one item was “a bracelet that [his] squadron had given [him]

when [he] was [in] Viet Nam and Thailand” and was “irreplaceable.” He estimated the total value of the items to be approximately \$12,000; however, he was able to recover his Jeep some time after the incident. Mr. May denied ever selling any prescription drugs to the defendant.

Mr. Adams recalled that he had met the defendant in December 2007 and considered him “just an acquaintance” – a neighbor from down the street. He denied ever selling prescription drugs to the defendant. On December 31, 2007, the defendant joined him and Mr. May for an early dinner at a Kingsport restaurant. Mr. May dropped the defendant at his home, and he and Mr. Adams returned to their home for the night.

At approximately 5:00 p.m. on January 1, 2008, the defendant telephoned Mr. Adams and asked what he was doing. Mr. Adams told the defendant that he was at a friend’s home for dinner. No plans were made for the men to meet later, and the defendant did not mention stopping by Mr. Adams’ home at any time during the conversation. Mr. May did not go to dinner with Mr. Adams because he was feeling sick that day.

At 6:00 p.m., Mr. Adams began his return home with dinner for Mr. May. He parked in front of the house and took the walkway to the backyard entrance at the kitchen. He immediately noticed that the motion sensor light near the garage was lit and that Mr. May’s Jeep was missing from the driveway. Mr. Adams also noticed that the kitchen door was open, which was unusual because he and Mr. May always kept the door locked. He then looked through the door to see Mr. May “standing in the kitchen with his face bleeding.” Mr. Adams walked into the kitchen, placed the food on the countertop, and was immediately hit by a baseball bat on the left side of his head. Mr. Adams recalled that he fell to the floor but could not recall whether he lost consciousness. Once he was able to lift himself from the floor, someone said to him, “Empty your pockets.” He realized the kitchen door was open so he “hit that door and got out of the house.” As he fled, someone grabbed his pants and “tore them off” trying to stop him. Mr. Adams ran to a neighbor’s house where he beat on the door and told them to call 9-1-1.

Mr. Adams suffered broken bones to his face and black eyes. He spent the night at a local hospital for observation where he underwent a computerized tomography (CT) scan. He testified that he continued to suffer from numbness to his face as a result of the injuries sustained in the attack.

On cross-examination, Mr. Adams stated that he had spoken to the defendant no more than three times prior to their dinner together on December 31. He adamantly denied that he sold the defendant prescription drugs or that the two had exchanged telephone numbers in order to facilitate drug transactions. Mr. Adams also testified that he would not have smoked in his home but that he would have put out his cigarette outside on the porch

in consideration of Mr. May's throat cancer diagnosis and treatment. He recalled that he had not seen the defendant on or since January 1, 2008.

Doctor Rebecca Austin, a neurosurgeon, testified that Mr. Adams suffered an altered level of consciousness resulting from his head injuries. She opined that Mr. Adams' injuries were caused by significant force and were consistent with blunt trauma inflicted by a baseball bat. A review of Mr. Adams' CT scan revealed several fractures to the left side of his skull, including an orbital fracture and a temporal bone fracture. Doctor Austin testified that the temporal fracture was her main concern because such fractures can be life-threatening if the temporal artery tears and causes bleeding into the brain. However, Mr. Adams did not suffer an arterial tear; therefore, she testified that his injuries were not life-threatening.

Nathan Elliott was a patrol officer with the Kingsport Police Department on January 1, 2008. He responded to the scene at approximately 6:40 p.m. and found medical personnel already at the home treating Mr. Adams for his injuries. Officer Elliott observed a lot of blood on Mr. Adams' face and head. He recalled that Mr. May stood nearby and had some blood on his face from cuts and scrapes. Mr. Adams was the only victim who required hospital treatment for his injuries. There were no suspects at the scene. Another officer, Kevin Hite, arrived with his dog but was unable to find "any kind of tracks" from the alley area. Officer Elliott secured the scene until Detective David Cole arrived at the scene to continue the investigation.

Officer Kevin Hite and his dog, Otis, responded to the scene at 7:50 p.m. Officer Hite testified that Otis "tracked" a scent from the garage area down the alley for approximately 50 to 75 yards to a nearby intersection where he lost the scent. Officer Hite explained that Otis was trained to track only human scent and that vehicles or water could cause loss of the scent. He recalled seeing a lid to a perfume or cologne bottle along the track but did not collect this evidence because, he explained, he was primarily responsible for canine tracking – not collecting evidence.

Kingsport Police Detective David Cole arrived at the scene to find Mr. May bleeding. He and other officers "went through the house" to collect evidence. Due to the nature of many of the surfaces in the home, the investigators were unable to obtain any fingerprints. Detective Cole also testified that no testing was performed on the cigarette butt found in the kitchen because they assumed it had been either tracked in or "belonged to the house." Mr. May's Jeep was recovered but no identifiable fingerprints were found in the vehicle. Despite several lineups, neither victim was able to identify either of the assailants. The defendant became a suspect based upon the disappearance of the laptop, cellular telephone, and Mr. May's Jeep from the residence while Mr. May and the two assailants were

upstairs.

Based on this evidence, the jury acquitted the defendant of attempted second degree murder. However, the jury convicted the defendant of the especially aggravated robbery of Mr. May, the reckless aggravated assault of Mr. Adams, and the aggravated burglary of the residence. At sentencing, the trial court imposed a sentence of 24 years' incarceration to be served at 100 percent as a violent offender for especially aggravated robbery. The trial court imposed concurrent sentences of four years' incarceration and six years' incarceration to be served as a Range I, standard offender for reckless aggravated assault and aggravated burglary, respectively. These sentences were ordered to be served consecutively to the 24 year sentence, for a total effective sentence of 30 years' incarceration. Timely post-trial motions followed the entry of judgments.

Sufficiency of the Evidence

The defendant contends that the evidence is insufficient to support his convictions for especially aggravated robbery, reckless aggravated assault, and aggravated burglary. He argues that there is no proof that he “had any type of relationship with the two unknown persons . . . to make him criminally responsible for their actions.” The State responds that the evidence shows that the defendant let the unknown attackers into the victims' home and took items from the home while the attackers and Mr. May were upstairs.

We review the defendant's claim mindful that our standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654. Although a criminal offense may be established exclusively by circumstantial evidence, *Duchac v. State*, 505 S.W.2d 237 (Tenn. 1973); *Winters*, 137 S.W.3d at 654, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances “must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant.” *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971). “In other words, ‘[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.’” *State v. McAfee*, 737 S.W.2d 304, 306 (Tenn. Crim. App. 1987) (quoting *Crawford*, 470 S.W.2d at 613).

When examining the sufficiency of the evidence, this court should neither re-

weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Winters*, 137 S.W.3d at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

The defendant was convicted of especially aggravated robbery, reckless aggravated assault, and aggravated burglary via a theory that he was criminally responsible for the acts of the two unknown assailants. To convict under a criminal responsibility theory, the State must establish that the defendant “[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, . . . solicit[ed], direct[ed], aid[ed], or attempt[ed] to aid another person to commit the offense.” T.C.A. § 39-11-402(2) (2006). In the light most favorable to the State and indulging the State all reasonable inferences, the evidence showed that the defendant telephoned Mr. Adams to determine whether he was at home and then arrived at the residence to find unexpectedly that Mr. May was at home. The defendant opened the locked kitchen door to allow the armed assailants to gain entry into the residence. While the assailants and Mr. May were upstairs, the defendant left with several items and drove away in Mr. May’s Jeep. Accordingly, we conclude that the evidence sufficiently establishes the defendant’s culpability for the actions of the unknown assailants.

Although not raised by the defendant in his brief, the State also asserts that the evidence established the requisite elements of each offense. Although we agree that the evidence clearly established the offenses of aggravated burglary and reckless aggravated assault, we conclude that the proof required to establish the especially aggravated robbery of Mr. May is lacking in this case.

A conviction for especially aggravated robbery requires proof that the defendant committed a robbery which is defined as “the intentional or knowing taking of property from the person of another by violence or by putting the person in fear.” T.C.A. § 39-13-401. In addition, the robbery must be “accomplished with a deadly weapon” and “the victim [must] suffer[] serious bodily injury.” *Id.* § 39-13-403. Serious bodily injury is defined as bodily injury involving “a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or substantial impairment of a function of a bodily member, organ or mental faculty.” *Id.* § 39-11-106(34) (2006).

The evidence in this case showed that Mr. May suffered a cut to his nose, abrasions to his face, and bruises to his face and shoulders as a result of the assault. Mr. May

did not require or seek hospital treatment for these injuries. Mr. May testified that he did not actually suffer much physical discomfort during the struggle with his assailants and only required some local anesthesia to his face when treated at the scene by emergency personnel within hours of the assault. He did not testify regarding any impairment or residual effects of the assault. Accordingly, we conclude that these injuries do not rise to the level of serious bodily injury. Because we conclude that there is no proof of serious bodily injury related to the especially aggravated robbery conviction, we reverse that conviction and remand the case for entry of judgment and sentencing for the lesser included offense of aggravated robbery.

Use of Defendant's Misdemeanor Theft Convictions as Impeachment

The defendant contends that the trial court erred in permitting the State to use as impeachment his misdemeanor theft convictions. The defendant acknowledges that the use of crimes of a similar nature to the offenses at trial as impeachment is not precluded per se, but he argues that the danger of unfair prejudice posed by the admission of his prior theft convictions required the trial court's exclusion of the impeachment evidence. The State contends that the prior theft convictions were highly probative of the defendant's credibility and were "sufficiently dissimilar" from the instant offenses to be held admissible for use as impeachment.

On the morning of trial, the defendant filed a motion in limine contending that his prior convictions were irrelevant and that any probative value of the convictions was outweighed by the danger of unfair prejudice. The defendant also argued that certain prior convictions for driving under the influence, driving on a suspended license, assault, public intoxication, and underage consumption were "more than 10 years old" and should not be used as impeachment. In his motion, the defendant requested a jury-out hearing to address the admissibility of the convictions.

After the close of the State's proof, the trial court discussed what prior convictions could be used to impeach the defendant should he testify. The State wished to introduce two counts of misdemeanor theft as crimes involving dishonesty. Defense counsel argued that, because theft is a lesser included offense of robbery, "there is substantial danger of unfair prejudice to my client that the jury would think just because he's been convicted of theft in the past he's automatically guilty of theft." The trial court determined that the credibility of the defendant would be of utmost importance should he elect to testify. The trial court also found that theft "clearly goes to dishonesty . . . [and] it substantially outweighs the prejudicial effect." The trial court acknowledged that theft is a lesser included offense of especially aggravated robbery but reasoned that aggravated robbery and aggravated burglary are "really more crimes of violence" than theft, presumably minimizing the danger of prejudice posed by the admission of the prior theft convictions.

Subject to certain conditions for admissibility, Tennessee Rule of Evidence 609 authorizes the use of proof of a witness's prior convictions to attack a witness's credibility. Tenn. R. Evid. 609(a). The prior conviction must be for a felony or a crime involving dishonesty or false statement. Tenn. R. Evid. 609(a)(2). When the witness to be impeached is the criminal defendant, the state must give notice prior to trial of its intent to utilize the conviction for impeachment purposes, *see* Tenn. R. Evid. 609(a)(3), and upon request, the court must determine the admissibility of an eligible conviction by deciding whether "the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues." *Id.* In making this determination, "two criteria are especially relevant." *State v. Mixon*, 983 S.W.2d 661, 674 (Tenn. 1999). First, the court must "analyze the relevance the impeaching conviction has to the issue of credibility" and "explain [the relevance] on the record," *id.*, and second, it must, "assess the similarity between the crime on trial and the crime underlying the impeaching conviction." *Id.* (quoting Neil P. Cohen, et al., *Tennessee Law of Evidence* § 609.9 at 376 (3d ed.1995)). On appellate review, the trial court's rulings on the admissibility of prior convictions for impeachment purposes are subject to reversal only for abuse of discretion. *See, e.g., Mixon*, 983 S.W.2d at 674.

In this case, the defendant's prior convictions for misdemeanor theft are crimes involving dishonesty; as such, they were clearly probative of the defendant's credibility. The trial court correctly noted the similarity of the theft convictions to the instant offenses but determined that the additional elements involving violence to the victim presented in the instant offenses minimized the unfair prejudicial effect posed by admission of the theft convictions. We conclude that the trial court did not abuse its discretion in admitting these offenses for impeachment.

Conclusion

Having concluded that the trial court correctly admitted as impeachment evidence the defendant's misdemeanor theft convictions and that there is sufficient evidence to support the defendant's convictions of aggravated burglary and reckless aggravated assault, we affirm the judgments of the trial court. However, having also concluded that the State failed to present sufficient evidence of serious bodily injury to support the defendant's conviction of especially aggravated robbery in count one, the judgment of the trial court is reversed and the case is remanded for entry of a judgment for aggravated robbery and resentencing as to count one.

JAMES CURWOOD WITT, JR., JUDGE